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Kruse v. Wells Fargo Home Mortgage, Inc. (decided September 10, 2004)

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KRUSE V. WELLS FARGO HOME MORTGAGE, INC.
(decided September 10, 2004)

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"It is emphatically the province and duty of the judicial department to say what the law is."[1] At the same time, when an administrative agency[2] interprets a statute to enforce the laws of the United States,[3] courts often defer to the agency's declaration of what the law is. In the celebrated case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[4] the United States Supreme Court designed a test for courts to apply when determining whether to defer to an agency's statutory interpretation contained in a legislative rule.[5] *Chevron*, however, only considered agency interpretations in

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1. Marbury v. Madison, 5 U.S. 137, 177 (1803).

2. *See generally* James Hunnicutt, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law*, 41 B.C. L. REV. 153 (1999) ("Congress creates administrative agencies to execute many of the statutes it enacts.").

3. *See generally* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 151 (4th ed. 2002) ("Agencies give meaning to ambiguous language in the statutes they administer through use of a wide variety of procedures and formats. The potential formats include legislative rules, adjudications, interpretive rules, policy statements, manuals, guidelines, staff instructions, opinion letters, and litigating positions.").

4. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

5. When Congress creates an administrative agency, it delegates many powers to the agency, "such as the authority to perform investigations, to conduct adjudications and . . . [most relevant to this Case Comment,] to adopt rules. Generally, agencies create two types of rules: legislative rules and nonlegislative rules." Hunnicutt, *supra* note 2.

Legislative rules, often called regulations, have the same force of law as statutes, and therefore must be promulgated only through formal or informal rulemaking procedures set forth in the Administrative Procedure Act. Formal rulemaking is required "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing," and the procedures are set forth in sections 556 and 557 of the Administrative Procedure Act. 5 U.S.C. § 553(c) (2005). Otherwise, informal rulemaking is required, and the procedures – "public notice of the proposed rule, receipt and consideration of comments on the proposed rule, and issuance of the final rule incorporating a statement of basis and purpose" – are set forth in section 553 of the Administrative Procedure Act. PIERCE, *supra* note 3, § 6.1, at 301. "[S]ection 553 procedure is accurately referred to 'notice-and-comment' rulemaking." BENJAMIN W. MINTZ

legislative rules, and courts were left wondering whether the *Chevron* test, which is highly deferential to the agency, should also be applied to statutory interpretations contained in nonlegislative rules.[6] Instead of providing clear guidance, subsequent Supreme Court cases have only confused this issue,[7] and the question remains: What level of deference should a court give to an agency's statutory interpretation contained in a document that does not inherently have the force of law? Should a nonlegislative rule enjoy the same level of deference as a legislative rule, or should a nonlegislative rule, by nature of its format, be accorded a "lesser" level of deference?

In *Kruse v. Wells Fargo Home Mortgage, Inc.*,[8] the United States Court of Appeals for the Second Circuit addressed the question of what level of deference it should give an agency's statutory interpre-

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& NANCY G. MILLER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 47 (2d ed. 1991).

Nonlegislative rules, on the other hand, do not have the same force of law as statutes. "Rather, they represent recommendations and advice. Nonlegislative rules have innumerable synonyms, such as interpretative rules, statements of policy, rules of agency organization and guidelines." Hunnicutt, *supra* note 2. Nonlegislative rules are excepted from the notice and comment requirements of Administrative Procedure Act section 553, and thus "represent a relatively low-cost and flexible way for agencies to articulate their positions, at least in tentative terms." John F. Manning, *Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: Chapter: Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 914 (2004). Nonlegislative rules are excepted "to balance the need for public input with competing societal interests favoring the efficient and expeditious conduct of certain government affairs." MINTZ & MILLER, *supra*, at 48.

Unless "Congress explicitly requires an agency to resolve some issues through issuance of legislative rules," agencies have a choice whether to issue a legislative rule or a nonlegislative rule. PIERCE, *supra* note 3, § 6.9, at 374.

> From an agency's perspective, this choice among types of rules involves a tradeoff. Legislative rules have much more powerful legal effects than [nonlegislative rules]. Yet, legislative rules often require many years and many thousands of staff hours to issue. It would be impossible for any agency to use the long and expensive process of issuing legislative rules to address definitively and in detail every issue that arises in the process of implementing a regulatory or benefits program.

Id. § 6.1, at 305 (citation omitted).

6. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 386 (2nd ed. 2001).

7. *See generally* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. Supp. 2004) (summarizing recent "confusing" United States Supreme Court decisions on the scope of *Chevron* deference).

8. 383 F.3d 49 (2d Cir. 2004).

tation contained in a nonlegislative rule, i.e., a policy statement. Specifically, in evaluating the validity of a cause of action against home-mortgage companies by a class of home-buyers, the court addressed what level of deference it was required to give the Real Estate Settlement Procedures Act Statement of Policy 2001-1 ("Policy Statement")[9] issued by the United States Department of Housing and Urban Development ("HUD"). In the Policy Statement, HUD interpreted the Real Estate Settlement Procedures Act ("RESPA")[10] to prohibit mortgage lenders from charging home-buyers more than the actual cost of settlement services provided by a third party without conducting any additional services to justify the price mark-up. Relying on the Policy Statement, plaintiff homeowners challenged the defendant mortgage companies' billing practices.[11] In holding that the homebuyers stated a cause of action, the Second Circuit applied *Chevron* deference to HUD's Policy Statement. This decision squarely contradicted the decision of the United States Court of Appeals for the Seventh Circuit in *Krzalic v. Republic Title Co.*[12]

This case comment contends that while the *Kruse* court may have correctly held the plaintiffs stated a valid cause of action, the court should not have accorded *Chevron* deference to the Policy Statement. Although it was due some deference, it was only due the "lesser" level of deference articulated in *Skidmore v. Swift & Co.*[13] Under *Skidmore*, HUD's Policy Statement, as a nonlegislative rule, was only "entitled to respect."[14]

The *Kruse* plaintiffs were a class of home-buyers who obtained federally related home mortgage loans from the defendant mortgage companies and were required, in connection with their loans, to purchase settlement services.[15] The defendants "outsourced" the performance of some of these required settlement services to third

9. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001).

10. 12 U.S.C. §§ 2601–2617 (2005).

11. *Kruse*, 383 F.3d at 53.

12. 314 F.3d 875 (7th Cir. 2002).

13. 323 U.S. 134 (1944).

14. *Id.* at 140.

15. *Kruse*, 383 F.3d at 53. 12 U.S.C. § 2602(3) (2005) provides:

party providers and paid the providers' fees.[16] For example, "the defendants outsourced document preparation to third parties at a typical per-service cost to the defendants of $20 to $50."[17] The plaintiffs claimed, however, that when the defendants billed them for the outsourced settlement services, they were not charged the actual prices.[18] Instead, the defendants, without performing any additional services, allegedly charged the plaintiffs higher fees and pocketed the difference.[19] The plaintiffs argued this billing practice of "marking-up" fees amounted to "splitting charges" and was therefore a violation of RESPA section 8(b) ("section 8(b)").[20]

By enacting RESPA in 1974, Congress sought to initiate reforms in the residential real estate settlement process.[21] RESPA was designed to protect home-buyers "from unnecessarily high settlement charges caused by certain abusive practices" adopted by mortgage providers in the home purchasing process.[22] One such abusive practice is "splitting charges," which is prohibited by section 8(b).[23] Specifically, section 8(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."[24]

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the term "settlement service" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing of settlement.

16. *Kruse*, 383 F.3d at 53.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 53–54.
21. 12 U.S.C. § 2601(a) (2005).
22. *Id.*
23. 12 U.S.C. § 2607(b) (2005).
24. *Id.*

Congress charged HUD with enforcing RESPA and granted HUD the authority "to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of [RESPA]."[25] Pursuant to this authority, HUD promulgated a set of rules to implement RESPA,[26] known as "Regulation X."[27] The initial version of Regulation X, however, did not elaborate on the "splitting charges" language of section 8(b).[28] HUD later amended the rules, and although the latest version of Regulation X does address section 8(b), it does not explicitly state whether the prohibition against splitting charges covers mark-up billing practices, such as those alleged in *Kruse*.[29] For that reason, HUD issued the Policy Statement[30] to declare that it interprets section 8(b) to prohibit mark-ups.[31] Specifically, the Policy Statement provided that:

> [HUD] interprets [section] 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: . . . one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing any additional

25. 12 U.S.C. § 2617(a) (2005).

26. Regulation X, 24 C.F.R. §§ 3500.1–3500.21 (2005).

27. *Id.* § 3500.1 (2005).

28. *Kruse*, 383 F.3d at 60.

29. *Id.* Regulation X provides:

> A charge by a person for which no nominal services are performed or for which duplicative fees are charged is an unearned fee and violates [RESPA Section 8(b)]. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 C.F.R. § 3500.14(c) (2005).

30. The Policy Statement was a nonlegislative rule because it was issued without going through notice and comment procedures, did not establish new law, and did not impose any new duties on the regulated community. The Policy Statement simply advised the community of HUD's interpretation of section 8(b). *See also* discussion *supra* note 5 (outlining the basic differences between legislative rules and nonlegislative rules). *See generally* PIERCE, *supra* note 3, §§ 6.3–6.5 (distinguishing between legislative rules and nonlegislative rules, i.e., policy statements, interpretive rules, and procedural rules).

31. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under section 8(b), 66 Fed. Reg. at 53,059.

> actual, necessary, and distinct services, goods, or facilities to justify the additional charge . . . .[32]

The *Kruse* plaintiffs filed suit in the United States District Court for the Eastern District of New York, alleging that the defendants violated section 8(b) by charging more than the actual cost of settlement services provided by third parties without conducting any additional services to justify the price change.[33] The plaintiffs urged the court to defer to HUD's interpretation of section 8(b) in the Policy Statement, but the court resisted.[34] In holding that the express language of section 8(b) "unambiguously does not apply to mark-ups,"[35] the District Court not only dismissed the plaintiffs' claim, but also chose to ignore the Policy Statement, declaring that HUD's [section] 8(b) interpretation contained therein "was either an impermissible one or entitled to no deference."[36]

On appeal, the United States Court of Appeals for the Second Circuit reversed, holding the plaintiffs had stated a valid cause of action because section 8(b), as interpreted by HUD in the Policy Statement, prohibits mark-up billing practices.[37] In reaching this holding, the *Kruse* court first concluded that the express language of section 8(b) is vague and ambiguous regarding mark-ups.[38] In the absence of clear statutory language on the plaintiffs' issue, then, the court decided that the Policy Statement deserved *Chevron* deference.[39]

In *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, an environmental group challenged a legislative rule adopted by the Environmental Protection Agency ("EPA") that interpreted the

32. *Id.*

33. *Kruse*, 383 F.3d at 52.

34. *Id.* at 53–54.

35. *Id.* at 54.

36. *Id.*

37. *Id.* at 61–62. The court, however, dismissed the plaintiffs' claim regarding "overcharging," a billing practice where a mortgage company charges a homebuyer more than the actual cost of settlement services it provided itself. The court concluded that section 8(b) unambiguously does not apply to "overcharges." *Id.* at 55–58.

38. *Id. But see* Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 267 (4th Cir. 2002) (holding that § 8(b) clearly and unambiguously does not prohibit mark-ups), Krzalic v. Republic Title Co., 314 F.3d 875, 879–80 (7th Cir. 2002) (same), and Haug v. Bank of Am., 317 F.3d 832, 838 (8th Cir. 2003) (same).

39. *Kruse*, 383 F.3d at 61.

words "stationary source" in the Clean Air Act.[40] The United States Supreme Court, in upholding the EPA's interpretation of "stationary source" as a permissible interpretation of an ambiguous statute, concluded that a court should defer to an agency's interpretation in a legislative rule if the statute is clear and the interpretation is consistent with the statute, or if the statute is vague and the interpretation is reasonable.[41]

The *Kruse* court acknowledged, however, that *Chevron* deference was not its only option.[42] Another level of deference, one not as deferential to the agency as the standard set forth in *Chevron*, was described in *Skidmore v. Swift & Co.*,[43] a case that considered judicial review in the context of agency interpretations contained in nonlegislative rules. In *Skidmore*, the United States Supreme Court held that when a court must determine the proper interpretation of a statute, it may give consideration to the agency's nonlegislative rules interpreting the statute, even though they are "not controlling upon the courts by reason of their authority."[44] The weight a court should give such a nonlegislative rule "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[45]

Although statutory interpretations contained in legislative rules are generally entitled to *Chevron* deference and those contained in nonlegislative rules are generally entitled to *Skidmore* deference,[46] the *Kruse* court applied *Chevron* deference to the Policy Statement. In doing so, the court relied upon language from *United*

40. *Chevron*, 467 U.S. at 840–41 (1984).

41. *Id.* at 842–43. To be precise, *Chevron* deference has a two-step approach. The first step is to determine whether the statutory language is clear or ambiguous. If the statute is clear and the interpretation is consistent with the statute, the interpretation is upheld. Additionally, if the statute is clear but the interpretation is inconsistent, the interpretation is void and the challenger wins. If the statute is ambiguous, however, the second step is invoked, and the court must ascertain whether the agency's interpretation is a reasonable construction of the statute. If the interpretation is reasonable, it is upheld. *See generally* PIERCE, *supra* note 3, § 3.2 (analyzing the "*Chevron* two-step").

42. *See Kruse*, 383 F.3d at 55.

43. 323 U.S. 134.

44. *Id.* at 140.

45. *Id.*

46. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

States v. Mead Corporation,[47] a case that took "pains to distinguish" *Chevron* from *Skidmore*.[48]

In *Mead*, the Mead Corporation challenged a classification ruling by the United States Customs Service that interpreted the word "diary" in the Harmonized Tariff Schedule of the United States.[49] In assessing whether the classification ruling, an informal adjudication, was entitled to judicial deference, the United States Supreme Court held that "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale."[50] The Court further held:

> that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.[51]

The *Kruse* court reasoned that the Policy Statement was entitled to *Chevron* deference because it contained an interpretation, Congress had authorized HUD to make interpretations,[52] and HUD issued the Policy Statement "in the exercise of that authority."[53] In addition, given that the Policy Statement was issued mainly in response to a 2001 Seventh Circuit decision,[54] "the Policy Statement was apparently the culmination of HUD's reflections on

47. 533 U.S. 218 (2001).

48. *Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring).

49. *Mead Corp.*, 533 U.S. at 225.

50. *Id.* at 234 (quoting *Christensen*, 529 U.S. at 587).

51. *Id.* at 226–27.

52. *See supra* text accompanying note 25.

53. *Kruse*, 383 F.3d at 60.

54. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. at 53,052 (explaining that the Policy Statement was issued in part to address § 8(b) questions raised by Echevarria v. Chicago Title & Trust Co., 256 F.3d 623 (7th Cir. 2001)).

the meaning of section 8(b) as applied to mark-ups over a period of years."[55] According to the court, HUD "possesses expertise regarding the market for federally related home mortgages," and the Policy Statement fit within the parameters of that expertise.[56] Finally, other circuits had "deferred to the Policy Statement, albeit in the course of determining when 'yield spread premiums' violate RESPA [section] 8(a), rather than whether mark-ups are covered by section 8(b)."[57]

Together, these reasons led the court to determine that *Chevron* deference was the appropriate level of deference to accord to the Policy Statement. The court concluded by applying HUD's interpretation of section 8(b) and finding that the plaintiffs had stated a valid cause of action.[58] It then remanded the case to the district court to determine whether the defendants did, in fact, engage in mark-up billing practices.[59]

Under *Kruse*, homebuyers can now sue mortgage companies for charging marked-up fees for settlement services outsourced to third party providers. While the *Kruse* holding appears to ultimately further the purposes of RESPA, the court should not have accorded HUD's Policy Statement *Chevron* deference. On the contrary, the Policy Statement was only due the level of deference described in *Skidmore*.

As the *Kruse* court noted, the United States Supreme Court proposed in *Mead* that *Chevron* deference may still be given to a nonlegislative rule that interprets a statute if Congress authorized the agency to make such rules.[60] Notwithstanding this and HUD's authority to make interpretations,[61] the Policy Statement did not deserve *Chevron* deference. This proposition is buttressed by a closer inspection of *Mead*. "Although [*Mead*] reserv[ed] the possibility of applying *Chevron* deference to agency interpretations announced in less formal settings [than legislative rules], the Court

55. *Kruse*, 383 F.3d at 61.

56. *Id.*

57. *Id.* (citation omitted) (citing Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002); Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004 (9th Cir. 2002); Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir. 2002)).

58. *Id.* at 61–62.

59. *Id.* at 62.

60. *Id.* at 58–59.

61. *See supra* text accompanying note 25.

made clear that such application would turn on the identification of circumstances affirmatively indicating a congressional intent to provide for such deference."[62] In *Mead*, the Court noted directly that Congress had delegated general rulemaking authority to Customs and, as a result, at least some Customs rules carried the force of law and could fall within the scope of *Chevron*.[63] The Court also noted, however, that even though "Congress had classification rulings [the informal adjudication format at issue in *Mead*] in mind" when making the delegation, "the terms of the congressional delegation [gave] no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."[64] Therefore, the Court held that the informal adjudication was not deserving of *Chevron* deference.[65] Although Customs could make informal adjudications that bind with the force of law, it could not do so in the format at issue in *Mead*. In other words, the format of the informal adjudication ultimately determined whether it was within the scope of *Chevron*.

Like the congressional delegation of Customs' rulemaking authority in *Mead*, HUD's authority to make interpretations signifies "that at least some HUD interpretations of RESPA [carry the force of law and] are within the scope of *Chevron*."[66] The Policy Statement, however, was not one of these interpretations. As with the format of adjudication in *Mead*, the format of an interpretation ultimately determines whether it is within the scope of *Chevron*.[67] In deciding what level of deference to give an interpretation, "the court must . . . identify a delegation of power [from Congress not just to make interpretations, but] to make binding interpretations through the particular format chosen by the agency."[68] The *Kruse*

62. Manning, *supra* note 5, at 938.

63. *See Mead Corp.*, 533 U.S. at 231–32; *see also* 19 U.S.C. § 1624 (2005) (authorizing the Secretary of the Treasury to "make such rules and regulations as may be necessary to carry out the provisions of [the Tariff Act of 1930].").

64. *Mead Corp.*, 533 U.S. at 231–32.

65. *Id.* at 231.

66. *Krzalic*, 314 F.3d at 878.

67. An agency's interpretation of a statute it is entrusted to administer can be presented in many formats, including legislative rules and nonlegislative rules. *See generally* PIERCE, *supra* note 3, § 3.5.

68. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 5 (1990).

court, however, did not identify whether Congress authorized HUD to make binding interpretations in a nonlegislative rule, the particular format chosen by HUD; it merely identified a delegation of authority from Congress to HUD to interpret RESPA. Had the court undertook this format identification, it would have observed that the terms of the delegation give no indication that Congress intended to delegate authority to HUD to issue interpretations in nonlegislative rules with the force of law.[69] Although HUD can make interpretations that bind with the force of law, it cannot do so in the nonlegislative rule format of the Policy Statement.

Congress was silent about format in its delegation of interpretive authority to HUD,[70] and this silence should not be construed to mean that Congress intended to authorize HUD to make binding interpretations in nonlegislative rules. In the Administrative Procedure Act ("APA"),[71] Congress itself defined several categories of rules, including nonlegislative rules.[72] In time, "[b]oth Congress and the courts . . . recognized . . . that [nonlegislative rules], exempt from notice and comment procedure by APA [section] 553, do not have binding effect either on citizens or on courts."[73] "It follows that Congress did not intend to delegate authority to any agency to make a policy decision that binds judges and citizens through the use of [nonlegislative rules]."[74] Congress, therefore, did not intend to delegate authority to HUD to bind courts and the public with an interpretation contained in nonlegislative rules. The *Kruse* court, consequently, should not have accorded *Chevron* defer-

69. *See supra* text accompanying note 25.

70. *See id.*

71. 5 U.S.C. §§ 551–583, 701–706, 801–808, 3105, 3344, 6362, 7562 (2005). The Administrative Procedure Act was passed by Congress in 1946 "to promote uniformity, fairness and public participation in how agencies operate." Hunnicutt, *supra* note 2, at 156. "One of the [Administrative Procedure Act's] major accomplishments was the establishment of minimum procedural requirements for many types of agency proceedings," including formal and informal rulemaking procedures. MINTZ & MILLER, *supra* note 5, at 3. *See also* discussion *supra* note 5 (discussing formal rulemaking, informal rulemaking, and the basic differences between legislative rules and nonlegislative rules).

72. *See* PIERCE, *supra* note 3, § 6.1.

73. *Id.* § 6.4, at 327.

74. *Id.* § 3.5, at 154.

ence to the Policy Statement, because *Chevron* deference has the result of giving its subject binding effect.[75]

The consequences of giving a nonlegislative rule, such as the Policy Statement, binding effect by means of *Chevron* deference would be devastating. Given that nonlegislative rules are exempt from notice and comment procedure, the "affected private parties" would be "bound by a proposition they had no opportunity to help shape and [would] have no meaningful opportunity to challenge when it is applied to them."[76] Moreover, if courts do not "insist upon a delegation as to format as a condition of *Chevron* [deference], interpretations set forth in [nonlegislative rules] would command as much force [of law] as do legislative regulations, and agencies could freely avoid the public procedures and safeguards required for issuance of such regulations."[77] Here, by according *Chevron* deference without addressing the format of the section 8(b) interpretation, the *Kruse* court indicated to HUD that it could legally bind the public with nonlegislative rules. Consequently, HUD may develop a routine of circumventing APA notice and comment requirements to obtain *Chevron*-provided binding effect for self-serving interpretations and interpretations that do not survive the procedures of legislative rulemaking.

The *Kruse* court is not the only court to have considered the Policy Statement. The United States Court of Appeals for the Seventh Circuit scrutinized the Policy Statement in *Krzalic v. Republic Title Co.*[78] With facts nearly identical to those in *Kruse*,[79] the *Krzalic* court affirmed the lower court's dismissal of the case, holding that section 8(b) is an "anti-kickback provision" which clearly and unambiguously does not apply to mark-ups.[80] Additionally, writing for the court, Judge Posner suggested that the Policy Statement was not

75. *See id.* § 6.4.

76. Anthony, *supra* note 68, at 58.

77. *Id.* at 5.

78. *Krzalic*, 314 F.3d 875.

79. In *Krzalic*, a class of homebuyers sued their closing agents, alleging that they were charged a marked-up fee of $50 for a $36 service and that the closing agents kept the $14 difference without providing any additional services. *Id.* at 877.

80. *See id.* at 877–79.

entitled to *Chevron* deference.[81] Judge Posner noted that the Policy Statement was nothing more than a "simple announcement" of HUD's position on mark-ups: "One fine day the [P]olicy [S]tatement simply appeared in the Federal Register. No public process preceded it."[82] If HUD intended the Policy Statement to be deserving of *Chevron* deference, he proposed, it should have used, "not necessarily formal adjudicative procedures or . . . [legislative] rule-making, but, still, something more formal, more deliberate, than a simple announcement."[83] Judge Easterbrook, in his concurring opinion, declared that "HUD's interpretation [was] on the *Skidmore* side of the line."[84]

Indeed, even if *Chevron* deference is not appropriate, statutory interpretations contained in nonlegislative rules are still "entitled to respect" under *Skidmore* and may "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[85] *Skidmore* deference allows a court to consider an agency's interpretation when determining the proper interpretation of a statute.[86] Here, the *Kruse* court could still have concluded the plaintiffs stated a valid cause of action using *Skidmore* deference. The court itself could have interpreted the language of section 8(b) to prohibit mark-ups, while giving weight to HUD's interpretation in the Policy Statement based "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[87] In fact, the court did this, merging *Chevron* deference and the *Skidmore* elements, when considering HUD's expertise and history of reflections on mark-ups to justify according the Policy Statement *Chevron* deference.[88] The *Skidmore* elements, however, only assist a court in determining how much weight to give an interpretation, not in determining

81. *Id.* at 881. The *Krzalic* court also suggested that even if the interpretation contained in the Policy Statement were entitled to *Chevron* deference, it would fail the two-step test. *See id.* at 879.

82. *Id.* at 881.

83. *Id.*

84. *Id.* at 882 (Easterbrook, J., concurring).

85. *Skidmore*, 323 U.S. at 140.

86. *See id.*

87. *Id.* at 140.

88. *See supra* text accompanying notes 55–56.

whether to give it *Chevron* deference. The *Kruse* court's reliance on these elements, then, confirmed that the Policy Statement was entitled only to the respect of *Skidmore* deference.

As *Kruse* illustrates, the debate over what level of deference a court should give to an agency's statutory interpretation contained in a nonlegislative rule continues. In the meantime, courts must be selective in according *Chevron* deference. To avoid frustrating the APA and instigating the devastating consequences of giving binding effect to a document that does not inherently have the force of law, courts must consider an interpretation's format when determining the appropriate level of deference to apply. An interpretation contained in a nonlegislative rule, by nature of its format, should not enjoy *Chevron* deference unless Congress has authorized the agency to make binding interpretations in such rules. A delegation of authority to make interpretations in a particular format is a condition attached to benefiting from *Chevron* deference.